

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JAN 31 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0161-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
SANTIAGO ALBERTO ALTAMIRANO,)	Rule 111, Rules of
SR.,)	the Supreme Court
)	
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20040875

Honorable Virginia C. Kelly, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Fred Cocio

Tucson
Attorneys for Respondent

Santiago A. Altamirano

Tucson
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Santiago Altamirano, Sr. pled guilty in three separate cases to aggravated driving under the influence of an intoxicant (DUI) while his license was

suspended, the latter two offenses with two prior DUI convictions. The trial court sentenced him to a presumptive, 2.5-year prison term in CR-20040875 and presumptive, ten-year prison terms in CR-20042130 and CR-20044278, to be served concurrently with the term in CR-20040875, but the term in CR-20044278 is to be served consecutively to the term in CR-20042130.

¶2 Altamirano then initiated a post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. In the subsequent post-conviction petition, appointed counsel asked the trial court to order the sentences in CR-20042130 and CR-20044278 to be served concurrently based on additional mitigating evidence that counsel suggested either constituted newly discovered evidence or reflected that trial counsel had been ineffective. After the state failed to respond, the trial court summarily denied relief on February 24, 2006, rejecting both claims. On April 5, Altamirano filed a motion in this court to extend the time for filing a petition for review. This court transmitted the motion to the trial court, which denied it on the ground it was untimely filed. Altamirano then filed a document entitled “Preclusion of Remedy for Delayed Petition and Review” in this court.

¶3 Under Rule 32.9(c), a petition for review must be filed within thirty days after a trial court issues a final decision on a post-conviction petition or a motion for rehearing. That same rule provides that motions for extensions of time to file petitions for review “shall be filed in and ruled upon by the trial court.” *Id.* But the time limits of Rule 32.9 are not jurisdictional, and this court may review a post-conviction ruling even if the defendant filed

an untimely motion for rehearing in the trial court. *State v. Pope*, 130 Ariz. 253, 255, 256, 635 P.2d 846, 848, 849 (1981); *State v. Padilla*, 176 Ariz. 81, 83, 859 P.2d 191, 193 (App. 1993). If a defendant has a valid reason for failing to comply with the time limits of the rule, a court may excuse an untimely filing. *State v. Grange*, 130 Ariz. 250, 252, 635 P.2d 843, 845 (1981).

¶4 It is undisputed that Altamirano's motion to extend the time for filing his petition for review was untimely and that he did not present a valid reason for its untimeliness to the trial court. *See* Ariz. R. Crim. P. 32.9(c). But we can infer a valid reason for the noncompliance from an additional document Altamirano filed in this court. *See State v. Vasquez*, 142 Ariz. 527, 529, 690 P.2d 1240, 1242 (App. 1984) (appellate court could infer from record before it that petitioner's delay in filing motion had resulted from fact trial court's ruling was sent only to attorney and not to petitioner).

¶5 Altamirano attached to his petition for review a copy of a letter from his Rule 32 counsel dated March 6, ten days after the date the trial court's post-conviction ruling was filed. In the letter, counsel reported the trial court had denied Altamirano post-conviction relief, stated a copy of the ruling was enclosed, and told Altamirano he had thirty days to file a petition for review in this court. On its face, therefore, the letter suggested Altamirano had thirty days from March 6 to file a petition. He filed his motion to extend that time in this court on April 5, within the thirty-day period counsel had erroneously promised him. We note in addition that Altamirano's name does not appear on the distribution list for the

trial court's post-conviction ruling. Moreover, as was true in *Padilla*, 176 Ariz. at 83, 859 P.2d at 193, the state has not complained the petition for review is untimely.¹ Accordingly, we address the merits of Altamirano's petition. We review the court's denial of relief for an abuse of discretion. *See State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001).

¶6 Altamirano argues his trial counsel was ineffective in leading him to believe the sentences in CR-20042130 and CR-20044278 would be concurrent, in failing to object to the court's finding he had prior DUI convictions,² and in failing to present sufficient mitigating evidence to persuade the trial court to impose concurrent sentences. To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional standards and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). A court need not address one requirement if the defendant fails to establish the other. *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992).

¹In fact, the state's response appears to be the response it intended to file in the trial court rather than a response to the petition for review. It refers to "this Court" when it clearly means the trial court and asks us to deny the petition for post-conviction relief, which the trial court has already denied. And it does not address why the trial court did not abuse its discretion in denying post-conviction relief.

²This argument ignores the fact Altamirano admitted he had the prior convictions when he pled guilty to the three offenses.

¶7 Altamirano did not raise the first two of the ineffectiveness claims below. Instead, he listed four circumstances he asserted counsel should have presented at sentencing in asking for concurrent sentences. In denying relief, the trial court reiterated its findings at sentencing. At sentencing, the court found the following aggravating circumstances: Altamirano had four prior felony convictions; seven misdemeanor convictions; a pattern of abusing alcohol and driving, which posed a risk to the community; and four DUI arrests within a ten-month period. In mitigation, the court found Altamirano had physical and mental health problems, was a veteran, had made efforts to rehabilitate himself, had family support, had committed nonviolent offenses, and was remorseful.

¶8 The court pointed out that trial counsel had fully argued the first two mitigating circumstances he now urges had not been argued by counsel at sentencing—that Altamirano had been honorably discharged from his military service after suffering a disabling eye injury and that he had attempted to rehabilitate himself many times. The court rejected the third circumstance—that Altamirano’s mother had since died, leaving his twelve-year-old son without a primary caregiver—because she had been alive at the time of sentencing and because the boy will be grown before Altamirano serves the first ten-year sentence. And, as the court noted, information that Altamirano suffers from cirrhosis and hepatitis C was in his social history at the time of sentencing—thereby resolving the last mitigating circumstance he argues here.

¶9 Trial counsel filed both a sentencing memorandum and an addendum to that sentencing memorandum, obtained three continuances of the sentencing hearing to discuss the issue, and argued at length at the sentencing hearing in an effort to persuade the trial court to impose concurrent sentences. He was not ineffective simply because he was unsuccessful. *See State v. Stanley*, 123 Ariz. 95, 106, 597 P.2d 998, 1009 (App. 1979). Under A.R.S. § 13-708, the sentences were to be consecutive unless the trial court determined otherwise. The court did not abuse its discretion in imposing consecutive sentences or in denying Altamirano’s post-conviction challenge to that determination.

¶10 Although we grant the petition for review, we deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge